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The 42nd Street Spur Case.

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CHARLES ELMORE CRO

IN THE

Supreme Court of the United States

No. 546—October Term, 1934.

WILLIAM ROBERTS, as Receiver of the Manhattan Railway Company, and others,
Petitioners,

against

THE CITY OF NEW YORK, *et als.*,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF FOR BOWMAN BILTMORE HOTELS CORPORATION (Hotel Commodore), THE BOWERY SAVINGS BANK, THE MANHATTAN STORAGE AND WAREHOUSE COMPANY, ONE TWENTY PARK AVENUE REALTY CORPORATION (property now owned by The Mutual Life Insurance Company of New York), CARBIDE & CARBON REALTY CO., INC., VANDERBILT AVENUE BUILDING CORPORATION, D. A. SCHULTE, INC., JOHN CURRY REAL ESTATE, INC., J. CHR. G. HUPFEL CO., INC., ROGERS PEET COMPANY, NEWS SYNDICATE CO., INC., F. & S. ROCKAWAY RESTAURANT INC., R-W REALTY COMPANY, INC., CLARA L. NORTH and ELLA BLACKBURN, Trustees of the Estate of James Kelley, Deceased, CHILDS COMPANY, J. CHR. G. HUPFEL, J. HOMER CUDMORE, ANAHMA REALTY CORPORATION and WILLIAM VOLK, *Respondents.*

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April 1, 1935.

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Reported Below:

265 N. Y. 170, 192 N. E. 188.

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William Roberts, as Receiver of the Manhattan Railway Company, and others,

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

Brief for Bowman Biltmore Hotels Corporation (Hotel Commodore), The Bowery Savings Bank, The Manhattan Storage and Warehouse Company, One Twenty Park Avenue Realty Corporation (property now owned by The Mutual Life Insurance Company of New York), Carbide & Carbon Realty Co., Inc., Vanderbilt Avenue Building Corporation, D. A. Schulte, Inc., John Curry Real Estate, Inc., J. Chr. G. Huppel Co., Inc., Rogers Peet Company, News Syndicate Co., Inc., F. & S. Rockaway Restaurant Inc., R-W Realty Company, Inc., Clara L. North and Ella Blackburn, Trustees of the Estate of James Kelley, Deceased, Childs Company, J. Chr. G. Huppel, J. Homer Cudmore, Anahma Realty Corporation and William Volk, Respondents.

Opinions Below.

The opinion of the Court of Appeals of New York (R. 410) is reported in 265 N. Y. 170. The Appellate Division, First Department, affirmed without opinion (238 App.

Div. 832; R. 407-408) the decision of the Trial Court by Mr. Justice Ingraham (adopting the opinion of Mr. Justice Mullan) which is reported in 143 Misc. 129 (R. 341). Mr. Justice Mullan's opinion is reported in 141 Misc. 565 (R. 331-340). Prior decisions of the Appellate Division and Trial Court in this controversy are reported in 229 App. Div. 617 (R. 283) and 126 Misc. 879 (R. Ex. AX, 1933-1985).

Statement of the Case.

The brief of the City of New York herein is hereby concurred in and inasmuch as the same contains a full statement of facts no extended statement is made in this brief.

This cause had its origin in a condemnation proceeding, begun in 1923 pursuant to a special Act of the New York Legislature, L. 1919, c. 611, as amended by L. 1923, c. 635. The condemned property was an elevated railroad spur, two blocks long, located in East 42nd Street, New York City, between Third and Park Avenues (hereinafter referred to as the "Spur"), built in 1877 and after due hearing adjudged by the Public Service Commission of the State on April 22, 1921 (R. Ex. AX, 1096)‡ to be "no longer necessary or convenient for the public service" and to constitute "an impediment and obstruction to the public use of the street" (Opinion below, R. 410, 411, 265 N. Y. 170, 178).*

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‡ On the retrial conducted pursuant to the decision in 229 App. Div. 617, the record in the former trial was introduced in evidence and marked "Exhibit A-X." It fills four volumes of the record now on file in this Court, and is herein called for convenience "R. Ex. AX."

* For the opinion of the Public Service Commission see 12 P. S. C. Rep. (1st Dist. N. Y.) 58. An excerpt from this opinion will be found in the "Appendix B," hereto.

In that proceeding, the Commission also found that "the Third Avenue line is securing its full and fair share of the increased traffic at Forty-second Street, caused by the development of that section, and it is securing it without any assistance whatever from the Spur, where traffic is actually on the decline" (Opinion of Commission, quoted in "Appendix B," *post*, pp. vi-viii). In addition, the Court found that the removal of the Spur would actually result in a benefit to the petitioners herein (R. 414, 265 N. Y., at p. 182), and that "it was their desire to escape the maintenance and operation of the Forty-second Street Spur" (R. 411, 265 N. Y., at p. 178).

This determination of the Public Service Commission, which antedated the condemnation proceedings, the Manhattan Railway Company, owner of the Spur, made no effort to have reviewed, although under State law a writ, or order, of certiorari to the Appellate Division of the Supreme Court was a readily available and adequate remedy. See Code of Civil Procedure, §§2120 *et seq.*, the statute in force in 1921; and see *People ex rel. New York & Queens Gas Co.* v. *McCall*, 219 N. Y. 84, 89 (1916), aff'd 245 U. S. 345 (1917).

It was thus a structure already moribund (by virtue of the Public Service Commission's determination) which the City of New York proceeded to condemn.

Thereafter this proceeding was instituted on September 30, 1921 by the City of New York to acquire title to the elevated railroad structure, tracks, stations, platforms, stairways and appurtenances of the Manhattan Railway Company in East 42nd Street, in the Borough of Manhattan, City of New York, constituting the 42nd Street Spur, and to acquire the right to extinguish all rights,

easements, etc., to construct, maintain and use said structure, tracks, etc. and to remove the said structure from the street.

Title to the property became vested in The City of New York on December 7, 1923, by virtue of a resolution of the Board of Estimate and Apportionment, adopted on November 23, 1923 (R. Ex. AX, 89).

The City owns the fee to the land in the bed of East 42nd Street in trust for street purposes (R. Ex. AX, 1065; 229 App. Div. 617, 620).

The respondents are all property owners within the area of assessment involved in this proceeding.

The petitioners William Roberts, as Receiver of the Manhattan Railway Company, the Manhattan Railway Company, Interborough Rapid Transit Company, Central Hanover Bank and Trust Company, as Trustee, and the Chase National Bank of the City of New York, as Trustee, are all Claimants.

The Manhattan owned lines are operated by Interborough under a 999 year lease. Both Manhattan and Interborough are in receivership.

The entire cost of acquiring the condemned property is borne by the property owners within the area of assessment extending from Thirty-fourth Street to Fiftieth Street and from Fifth to Second Avenues, as determined by the Board of Estimate and Apportionment of the City of New York (R. Ex. AX, 88).

Of the total award made by the New York Courts in this proceeding, about 37% is assessed upon the property of the above-named respondents herein.

The cause was first tried at an extraordinary Special Term of the New York Supreme Court (Mr. Justice James

O'Malley presiding) which by a final decree, dated February 28, 1928, made an award in favor of the Petitioners viz:

(1) $120,438 for the physical structure of the Spur (R. Ex. AX, 1984).

(2) $25,000 for the franchise to build, maintain and operate the Spur and the right of occupation in the street (R. Ex. AX, 1980).

(3) $750,000 for the rights to impair the abutting property owners' easements of light, air and access (R. Ex. AX, 1982).

(4) $80,000 for the cost of reconstruction and alteration of the elevated station at East 42nd Street and Third Avenue made necessary by the removal of the Spur (R. Ex. AX, 1984).

Cross appeals were then taken by all parties to the Appellate Division, First Department, which reversed the final decree of Mr. Justice O'Malley except as to the item of eighty thousand dollars, holding that the physical structure should be valued as scrap, that the franchise was of no value and that the value of the rights to impair the abutting property owners' easements of light, air and access should, upon a new trial, "be valued at the time of taking at not less than upon the basis judicially determined as their value at the time of their acquisition" (1888-1904) (Opinion R. 301, 305; 229 App. Div. 617, 628).

A second trial was then had before Mr. Justice George V. Mullan who rendered an opinion reported in 141 Misc. 565 (R. 331) and prepared a tentative decree but died before signing the final decree.

Upon a retrial before Mr. Justice Phoenix Ingraham, upon the same testimony, exhibits and rulings (R. 182) he

adopted the opinion of Mr. Justice Mullan (R. 341, 143 Misc. 129), and made a final decree awarding the claimants:

(1) $235 for the physical structure of the Spur, conceded to be its scrap value (R. 331; 141 Misc. 565, 567).

(2) $539,117.41 for the rights to impair the abutting property owners' easements of light, air and access (R. 340).

(3) $80,000 for the cost of the reconstruction and alteration of the elevated station at East 42nd Street and Third Avenue made necessary by the removal of the Spur (R. 340).

All parties then appealed from said decree to the Appellate Division, First Department, which unanimously affirmed the same without opinion (R. 388; 238 App. Div. 832).

Cross appeals to the Court of Appeals were then taken by the same parties pursuant to leave of said Appellate Division both from its final order entered March 24, 1933, affirming the decree of Mr. Justice Ingraham and from its intermediate order dated May 9, 1930, reversing the final decree of Mr. Justice O'Malley (R. 345-385). By a four to two decision the Court of Appeals on July 3, 1934, affirmed the order appealed from (R. 410; 265 N. Y. 170), but held that the decree of Mr. Justice O'Malley was not before it for review as it was not an intermediate order subject to review on this appeal (R. 413, 265 N. Y. 170, 180).

On September 13, 1934, a judgment on the remittitur from the Court of Appeals was entered in the New York Supreme Court (R. 427).

Thereafter the Petitioners by petition dated November 26, 1934 (No. 546, October Term, 1934), applied to the Supreme Court of the United States for a writ of certiorari to the Supreme Court of the State of New York to review the judgment of said Court entered herein in the office of the Clerk of the County of New York on September 13, 1934, upon said remittitur of the Court of Appeals of the State of New York.

On January 7, 1935, the Supreme Court of the United States granted said writ of certiorari prayed for by the Petitioners, and on March 18, 1935, this Court denied a cross petition for such a writ on behalf of the above-named Respondents.

A chronology of events with regard to the beginning, duration and end of the Spur is hereto annexed as Appendix A.

Summary of Argument.

In order to avoid duplication, as briefs covering the other points relied on by the above named respondents are being filed on behalf of The City of New York and by other respondents, this brief is confined to three main points, which may be outlined, viz.:

The Petitioners are not entitled to any compensation for the rights to impair the abutting property owners' easements of light, air and access or for the franchise to construct, maintain and operate the Spur because (1) there was no "taking" of said rights and franchise in the constitutional sense, (2) said rights and franchise were worthless because the Spur was being operated at a loss, (3) the award therefor is in contravention of the rule laid down

in *Muhlker* v. *N. Y. & Harlem RR. Co.*, 197 U. S. 544, and (4) said rights and franchises were acquired for railway purposes only under the authority of the Rapid Transit Act of 1875 (see Appendix "C" hereto) which in effect limited their duration to such period of time as their exercise might be a matter of public convenience and necessity. Accordingly, said rights and franchises automatically ceased upon the finding and order of the Public Service Commission for the First District on or about April 22nd, 1921, determining that such operation was no longer a matter of public convenience and necessity, but on the contrary that the Spur constituted an impediment and obstruction to the public use of the Street, followed by the condemnation proceeding herein brought by the City of New York, which resulted in vesting title to the Spur in the City on December 7, 1923.

ARGUMENT.

I.

Petitioners are not entitled to any compensation for the rights to impair the abutting property owners' easements of light, air and access.

The Courts below awarded the Petitioners $539,117.41 for the rights to impair the abutting property owners' easements of light, air and access (hereinafter sometimes called the "so-called easements"), which under the ruling in *Story* v. *N. Y. Elevated R. R. Co.*, 90 N. Y. 122 (1882) the railway company was compelled to acquire in 1888-1904 from the abutting property owners as a condition pre-

cedent to the lawful operation of the elevated railway under its franchise.

In its opinion, the Court of Appeals stated (R. 412, 265 N. Y., at p. 180), viz.:

> "Quite apart from the discussion of the cases, it is clear that the railroad merely exhausted the right of the abutting owners to complain because the railroad was in the street and so trespassing on their property. The railroad as such possesses a right to impair the easements by the operation of its road. If it did not have such rights it would be guilty of an injury to the inheritance."

It will thus be seen that the original acquisition was for the purpose of rendering lawful the operation of the elevated railway and for no other purpose (R. 301, 229 App. Div. 617, 628).

Accordingly, such rights automatically terminated when the operation of the Spur ceased. This is illustrated in the case of

Heard v. *City of Brooklyn*, 60 N. Y. 242.

In that case the plaintiff brought an action of ejectment for a strip of land 50 feet wide, forming the southerly portion of Atlantic Ave., Brooklyn.

By an act of the Legislature, a railroad company had been authorized to acquire land by condemnation proceedings *for the use* and *accommodation* of said railroad, and on payment of compensation the company was to "become entitled to the use of said land for the purposes aforesaid" (p. 243 of opinion).

Under this act the company acquired the use of a strip 80 feet wide by about 700 feet long, which included the land in question.

Subsequently, Atlantic Ave. was laid out 70 feet in width and included 30 feet of the northerly portion of said strip of 80 feet, leaving the 50 feet now claimed in the occupation of the company.

Thereafter, it was projected to widen Atlantic Ave. by including said adjoining strip of 50 feet and an act was passed by the Legislature authorizing the railroad company to cede the same to the City of Brooklyn for a public street. In due course a deed was executed conveying this property to the City, and the company thereupon removed its tracks and the City entered and constructed the street.

In reversing the General Term of the Supreme Court, Second Department, the Court of Appeals (p. 246 of opinion) held that the

> "[railroad] company became entitled only to the use of the land for the purpose of operating its railroad. The fee remained in the original owners, subject only to that use, and on the discontinuance of the use, the owners were entitled to resume possession of the land."
>
> "This reversion was a valuable interest in the land, of which the owners could not legally be deprived without compensation."

The opinion (p. 247) then goes on to state that where the whole fee has been acquired the original owner has no reversionary or other interest in the land.

> "But it is otherwise when land has been taken for a *particular use* only, and that use is discontinued and abandoned" (italics ours).

Accordingly, it was decided that the City derived no title as against the plaintiffs, from the conveyance by the railroad company, or the legislative acts authorizing that

conveyance, for the *particular use* having been discontinued, the property reverted to the original owners, of whom plaintiffs were admitted to be the representatives (pp. 247-248 of opinion).

Similarly in the instant case, the Railway Company acquired for *railroad purposes only*, the rights to impair the abutting owners' easements of light, air and access, and when the use was discontinued and the Spur removed, those rights reverted to the *original* owners and their successors in interest, so that there was nothing left to vest in the City of New York. In other words, the Railway Company, and its successors, received just what it paid for and should be given nothing more.

Under the law of New York, therefore, the Petitioners are not entitled to any compensation for said rights to impair.

The force of the *Heard* decision was perceived by the Court below, for they said (R. 413-414, 265 N. Y., at p. 181):

> "That these easements would be worth $3,600,000 to the abutting owners if they now owned them is beside the point. What is the city taking from the railroads? That is the question."

In so analyzing the case, the Court below was merely following in the footsteps of Mr. Justice Holmes, who in speaking for this Court in *Boston Chamber of Commerce* v. *City of Boston*, 217 U. S. 189 (1910), said (p. 195):

> "And the question is what has the owner lost, not what has the taker gained."

What the owner in this proceeding lost may be fairly stated in the language of the Appellate Division in its opinion (R. 288, 229 App. Div. 617, 620):

> "Upon this record it is fair to say that the cost of the operation of the spur exceeded by many thousands of dollars yearly the revenue therefrom, and that the taking by the City of the spur was a benefit to the claimants."
>
> • • • • • • • •
>
> "We find, therefore, that *these rights should be valued at the time of taking* at not less than upon the basis judicially determined as their value at the time of their acquisition" (R. 301; 229 App. Div. 617, 628; italics ours).

In other words, in spite of the fact that the Petitioners lost nothing the Court decided to give them $539,117.41 of the property owners' money, although the frontage of 1698½ feet opposite the Spur was burdened with the encumbrance thereof for a period of twenty-five years at a yearly cost per front foot to the Petitioners of about $6.

Apparently Chief Judge Pound, though conceding in his opinion that the City's argument that the rights to impair the easements were not compensable at all "has some logical force" (R. 413, 265 N. Y., at p. 181), nevertheless felt that substantial justice required compensation in some measure to be paid. He accordingly declared (R. 413, 265 N. Y., at p. 181):

> "• • • the city should reimburse the railroads for what it cost them to acquire such easements when it terminates the right of use in perpetuity."

The learned Judge did not spell out the source of the duty behind the phrase "should reimburse". As we pointed out *supra*, page 11, citing *Heard* v. *City of Brooklyn*, the duty positively did not exist—on strictly legal considerations. The railway company bought an evanescent kind of property, as it well knew. That which precipitated and completed the process of evanescence was a determination

of the Public Service Commission, which the railway company elected not to review but to accept.

Nevertheless Chief Judge Pound thought that *ex aequo et bono* the City should pay something.

The Railway Company paid for the rights acquired by judicial determination $175,199.99 and for rights acquired by voluntary settlements $91,295, making a total of $266,494.99, whereas the New York Court actually awarded for all of these rights, including those acquired by prescription, the sum of $539,117.41, an excess of $272,622.42 over their cost to the Railway Company without making any deduction for the damages to abutting property from the time of the acquisition of these rights by the Railway Company to the time of the removal of the Spur (R. 319, 340).

Furthermore, in the case of rights acquired by voluntary settlements which included past as well as future damages, no separation could be made so that the railway companies were reimbursed not only for the amount paid for the rights to impair in future but also for the past damages paid by them at the time of the acquisition of the rights to impair, thus making the excess over cost considerably greater than the amount above specified.

At page 181 of its opinion (R. 414; 265 N. Y. 170) the Court of Appeals stated viz:

> "It, therefore, acquired no real title to these easements apart from the operation of its road. They otherwise still attach to the property of the abutting owners."

Accordingly, the Railway Company acquired no easements which it could sell or use for other than railway purposes.

As the Spur was being operated at a loss the rights to impair were of no value for railway purposes, and since they could not be sold for other purposes they had no value whatsoever so that the New York Court in making an award for them to the Petitioners on the quasi-contractual theory of preventing unjust enrichment gave the Petitioners something to which they were not legally entitled.

Throughout their brief the Petitioners assume that the franchise and rights to impair easements acquired by the Railway Company were in perpetuity, whereas an examination of the statutes and proceedings under and pursuant to which the same were acquired will demonstrate that their life was limited to the period during which their exercise was a matter of public convenience and necessity.

Since the Spur was constructed pursuant to the provisions of the Rapid Transit Act of 1875, Chapter 606, Laws of New York, 1875 (R. Ex. AX, 1941; 265 N. Y. 170, 179), the powers of the Railway Company to acquire property must be measured by the authority granted thereby.

An examination of the statute will disclose that the acquisition of property by said Company was limited to railroad purposes (see Sections 17, 18, 19, 20, 22, 25 and 26). In the case of voluntary grants, Section 26, subd. 1, states that property acquired by voluntary grant shall be held and used for the construction, maintenance and accommodation of the railroad only.

Pertinent extracts from these Sections of the Rapid Transit Act will be found in "Appendix C" hereto, from which it will be noted that all that the Railway Company acquired by conveyance, judgment, condemnation and prescription was the right to impair these easements so long as the Spur was maintained and operated for rail-

road purposes. As the Appellate Division said (R. 301; 229 App. Div. 617, 628):

> "Considering as we must, that they [the rights in question] could only be used in connection with an elevated railroad or a kindred purpose. * * *"

In other words, the Railway Company acquired a qualified right, to wit, a limited right so long as the Spur was maintained and operated for railroad purposes with the right of reverter to the abutting owners of their unimpaired easements of light, air and access in case the Spur ceased to be used for such purpose.

This contention is recognized by the Appellate Division in its opinion (R. 296; 229 App. Div. 617, 625), viz:

> "As these so-called rights when acquired by the railroad were of no use to it, except as it was compelled to acquire them in order to operate pursuant to its franchise, it would naturally follow that such rights would expire with the cessation of the operation of the railroad."

Said Court then proceeded to value these rights upon the theory that (R. 295; 229 App. Div. 617, 625):

> "It would be unfair to the railroad to permit this value to be taken from it and added to the abutting property without compensation to the railroad."

The Railway Company may have unknowingly assumed in the first instance the hardship of compensating the abutting owners for the impairment of their easements (R. Ex. AX, 1978; 126 Misc. 879, 910), but that is no reason for making them a *present* of $539,117.41 when (1) the Railroad Company's rights only existed so long as the Spur was a subject of public convenience and necessity; (2) the rights

were worthless at the time the Spur was acquired because it was being operated at a loss; (3) the rights were limited to railroad purposes only and hence cannot be valued on any other basis.

Merely because damages may have been assessed in favor of the abutting owners without contemplating a right of reverter, is no reason for denying the existence of the same, if otherwise shown. The Railway Company received just what it paid for, namely, the right to impair these easements so long as the operation of the Spur was a matter of public necessity and convenience.

The opinion of the Appellate Division (R. 290, 296; 229 App. Div. 617, 621, 625) states viz:

> "Since the record shows that this Spur could no longer be operated except at a large annual loss and that the taking by the City was a distinct benefit to the claimants, * * * we cannot close our eyes to the fact that this condemnation is a present benefit to the railroad because, as noted, the operation of this Spur was unprofitable,"

and further (R. 302; 229 App. Div. 617, 628; italics ours):

> *"In the first place, no one today would acquire them* [the rights in question] *for the purpose of running an elevated railroad. This because of the changed city conditions, including the advent of the subway."*

Accordingly, there were no rights to impair said easements left in the Petitioners subsequent to 1921, which might be said to vest in the City on December 7, 1923, the date of vesting of title herein.

That the 42nd Street Spur was no longer a matter of necessity and convenience and that it constituted an impediment and obstruction to the public use of said street, was

conclusively determined by an order of the Public Service Commission of the First District, dated April 22nd, 1921, reading, in part (R. Ex. AX, 1101), viz (italics ours):

> "The Public Service Commission for the First District does hereby order and determine (1) that the tracks, structure, station and appurtenances of the Manhattan Railway Company in East Forty-second Street, in the Borough of Manhattan, City of New York, are *no longer necessary and convenient for the public service and constitute an impediment and obstruction to the public use of said street.* * * *"

This determination of the Public Service Commission was made pursuant to the provisions of Chapter 788 of the Laws of 1917, as amended by Chapter 611 of the Laws of 1919. The validity of these proceedings before the Public Service Commission and the constitutionality of Chapter 788 of the Laws of 1917 were questioned by the Petitioners at the Special Term on the application for the order of condemnation and on their appeal from the order of condemnation herein, dated July 18, 1923, and overruled by the Appellate Division, which affirmed without opinion the order appealed from (208 App. Div. 794).

No appeal was taken to the Court of Appeals from the Order of the Appellate Division affirming the order of condemnation.

Therefore, the order of condemnation made herein is final and conclusive.

Furthermore, this Court has held that the *Elevated Railroad Cases* decided by the Court of Appeals, established the law of the State of New York to be that the easement of light and air of abutting property owners in the streets of New York City above the street to be property and within

the protection of the Constitution for compensation in case of its diminution by an elevated railroad structure.

Muhlker v. *N. Y. & Harlem RR. Co.*, 197 U. S. 544.

Accordingly, the judgment in the case at bar, insofar as it awards the Petitioners the sum of $539,117.41 for the rights to impair these easements, in effect takes away from the abutting property owners the compensation theretofore paid them upon the acquisition of said rights.

In other words, as heretofore pointed out, the judgment below awards the Petitioners for said rights, which had become worthless, a sum $272,622.42 in excess of the amount paid to the abutting property owners for the same, thereby completely disregarding the doctrine of the *Elevated Railroad Cases*, held by this Court in the *Muhlker Case, supra*, to be a rule of property.

Hence, Petitioners are entitled to no compensation whatsoever for their limited rights to impair the abutting property owners' easements of light, air and access and accordingly, the Court below erred in making an award of $539,117.41 for these rights.

II.

Petitioners are not entitled to any compensation for the franchise to construct, maintain and operate the spur.

Respondents herein have persistently maintained with the City that the only property owned by the railroad in East 42nd Street, was the 42nd Street Spur, which consisted of the franchise, the elevated railroad structure and

the right to maintain it and operate cars and trains thereon free from interference and the right of interference by the abutting property owners.

It has also been maintained that since the Spur was not profitably operated (R. Ex. AX 1955), and further that it was operated at a large annual loss* (R. 290) it had no value other than scrap value of the structure.

With respect to the value of the franchise and elevated structure the Appellate Division held (R. 290), viz.:

> "The rights of the railroad in the street were strictly limited by the franchise which it had acquired from the City and State. Since the record shows that this spur could no longer be operated except at a large annual loss and that the taking by the City was a distinct benefit to the claimants, and the Public Service Commission, after proceedings and hearings, have determined and ordered that the spur was no longer necessary and convenient for the public service, it therefore follows that the right to run an elevated railroad in this street under these conditions was of no value.
>
> Under the same conditions we are unable to ascribe to the elevated structure value other than what it would be worth taken down."

The Court of Appeals said (R. 414):

> "It is difficult to see what the railroad has lost by the taking of its street franchise. It has gained relief from the burden of operating the road. What would any one pay for the franchise apart from the right to occupy the street? Should it receive more for its franchise when the spur can be operated only at a large annual loss? * * * the finding that the Forty-second street franchise had no value should not be disturbed.

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* In 1923, the date title vested in City, it was $24,017 (R., Ex. AX 607).

> Next comes the question of the award for the structures in the street. * * * The right to have the structure in the street was worthless if the street franchise was terminated. The structures had only a nuisance value when the right to have them in the street ended."

The franchise in this case to construct, maintain and operate the 42nd Street Elevated Spur had its source in the Rapid Transit Act of 1875 (Laws of 1875, chap. 606; Appendix C, *infra*). (265 N. Y. 179, R. 411.)

It has been the settled law of this State since the decision of this Court in the *Charles River Bridge Case*, 11 Peters 420 (1837), that franchises granted by the State or its agencies are to be strictly construed, and corporations to which the same are granted can take no implied rights as against the State or private individuals.

The Binghamton Bridge Case, 3 Wall. 51 (1865), reversing 27 N. Y. 87;

Auburn and Cato Plank Road Co. v. *Douglass*, 9 N. Y. 444 (1854);

Syracuse Water Co. v. *City of Syracuse*, 116 N. Y. 167 (1889);

Skaneateles Water Co. v. *Village of Skaneateles*, 161 N. Y. 154 (1899).

In the *Binghamton Bridge Case, supra*, DAVIS, J., in delivering the opinion of the Supreme Court of the United States, stated at page 75, viz.:

> "In the case of the Charles River Bridge, the rules of construction known to the English common law were adopted and applied in the interpretation of legislative grants, and the principle was recognized, that charters are to be construed most favorably to the State, and that in grants by the public

nothing passes by implication. This court has repeatedly since reasserted the same doctrine; and the decisions in the several States are nearly all the same way. The principle is this: that all rights which are asserted against the State must be clearly defined, and not raised by inference or presumption; and if the charter is silent about a power, it does not exist. If, on a fair reading of the instrument, reasonable doubts arise as to the proper interpretation to be given to it, those doubts are to be solved in favor of the State; and where it is susceptible of two meanings, the one restricting and the other extending the powers of the corporation, that construction is to be adopted which works the least harm to the State. But if there is no ambiguity in the charter, and the powers conferred are plainly marked, and their limits can be readily ascertained, then it is the duty of the court to sustain and uphold it, and to carry out the true meaning and intention of the parties to it. Any other rule of construction would defeat all legislative grants, and overthrow all other contracts."

In *Auburn and Cato Plank Road Co.* v. *Douglass, supra,* plaintiff brought an action for an injunction enjoining defendant from permitting his road to be kept open so that it might be used by the public for travel in order to avoid plaintiff's toll gate. In construing the franchise granted by plaintiff's charter and holding that it could not be enlarged by implication so as to grant the privilege of exclusion on the different sides of the road, SELDEN, J., stated at pages 453-454, viz.:

"If then, as established by these cases, a corporation is strictly confined to the privileges conferred by its charter, and can take no implied rights as against the law-making power, *a fortiori* should it not be permitted to encroach by implication upon the rights of individuals who are in no respect parties to the compact between the legislature and such corporation."

In *Syracuse Water Co.* v. *City of Syracuse, supra,* the question on which the case hinged was the construction of the franchise granted by the State to the plaintiff to supply the City of Syracuse with water.

In holding that the franchise did not confer an exclusive right upon the plaintiff, BRADLEY, J., used the following language at page 178, viz.:

> "Whatever support that rule may seemingly have in reason or propriety, it is not now available to that extent for the beneficial protection of the grantee in the exercise of his franchise, but, on the contrary, public grants are to be so strictly construed as to operate as a surrender by them of the sovereignty no farther than is expressly declared by the language employed for the purposes of their creation.
>
> The grantee takes nothing in that respect by inference. Such is deemed the legal intent of the state in imparting to its citizens or corporations powers and privileges of public character. And, therefore, except so far as they are by the terms of the grant made exclusive, the power is reserved to grant and permit the exercise of competing and rival powers and privileges, however injurious they may be, to those taken by the prior grantee."

In *Skaneateles Water Co.* v. *Village of Skaneateles, supra,* the question of the exclusiveness of a Water Company's franchise was also involved. In holding that the same was not exclusive, Parker, Ch. J., used the following language in delivering the opinion of the Court at pages 165-166, viz.:

> "All franchises come from the State, although the legislature may, and often does, delegate to municipal authorities the right to take final action in the procedure resulting in the creation of a franchise (*Ghee* v. *Northern Union Gas Co.*, 158 N. Y. 510, 513). The effect of such action, if within the

> legislative permission, is to allow the grantee to carry on the business authorized by the franchise. All rights not expressly granted by it are, as we have seen, reserved. The rights thus reserved include in part the granting of a franchise to another corporation to carry on the same business in the same territory. The power to grant the additional franchise, as well as the first one, the municipality acquires from the legislature, which has the power to determine whether the rights reserved upon the grant of a first franchise shall be exercised by a private corporation or by the municipal corporation."

Upon the foregoing authorities and for the reasons above stated, the Petitioners acquired the franchise in the present case for *railroad purposes only* so long as the operation of the Spur was necessary, and the Public Service Commission for the First District has duly determined that the same was no longer necessary and convenient for the public service, and constituted an impediment to the public use of East 42nd Street.

Accordingly, this franchise expired in 1921 by limitation of the terms contained in the Rapid Transit Act of 1875, in which it had its source as above stated, and when title vested in the City of New York herein there was no existing franchise entitling the Petitioners to compensation.

III.

There was no "taking" by the City of the Petitioners' rights to impair the abutting property owners' easements or the Petitioners' franchise to construct, maintain and operate the Spur.

As demonstrated in Point I, *supra*, there was no "taking" of the Petitioners' rights to impair the abutting property owners' easements of light, air and access, but a termination of said rights which is not a taking within the meaning of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Omnia Commercial Co. Inc. v. *United States*, 261 U. S. 502 (1923);
Mullen Benevolent Corp. v. *United States*, 290 U. S. 89 (1933).

In delivering the opinion of the Court in the *Omnia* case, *supra*, Mr. Justice Sutherland stated at page 508 (italics ours), viz.:

> "The contract in question was property within the meaning of the Fifth Amendment, *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 685, 690; *Cincinnati* v. *Louisville & Nashville R. R. Co.*, 223 U. S. 390, 400, and if taken for public use the Government would be liable. But destruction of, or injury to, property is frequently accomplished without a 'taking' *in the constitutional sense.*"

In the case at bar, as in the cases above cited, the City did not take these rights from the Petitioners. At no time since the condemnation or removal of the Spur did the City have the right to obstruct or impair the light, air or

access of the abutting properties. Nor was there a taking by destruction, as in the case of a franchise. The fact is that no rights to impair easements remained when the right to operate the Spur terminated. These rights were not *perpetual,* but were from the beginning ineffective to continue without the railroad.

Assuming, however, that there was a "taking" of property, it was not a taking under the due process clause, but under state law. The situation is aptly described in the opinion below as follows (R. 412):

> "Quite apart from the discussion of the cases, it is clear that the railroad merely exhausted the right of the abutting owners to complain because the railroad was in the street and so trespassing on their property. The railroad as such possesses a right to impair the easements by the operation of its road. If it did not have such rights, it would be guilty of an injury to the inheritance."

Assuming further that the Railway Companies had to pay damages in order to avoid trespassing on the abutting property, it does not follow that the termination of the right to trespass is tantamount to a "taking" of property *in the constitutional sense.* When the Petitioners set up a claim of right under the Constitution of the United States, to the effect that their property is being taken without due process, they must show that the taking is one cognizable under the Constitution. *Omnia Commercial Co., Inc.* v. *United States, supra,* and cases cited therein.

Since there was no "taking" of property in the constitutional sense, Petitioners are not entitled to any compensation for the termination of their rights to impair the abutting property owners' easements of light, air and

access and the Court below erred in awarding therefor the sum of $539,117.41.

Further Comments.

(1) The Petitioners contend in effect that the appreciation in value of property on 42nd Street, since the removal of the Spur, is evidence of the loss they have sustained.

In fact, however, it is direct evidence of the loss which the property owners have sustained in having the development of 42nd Street and its environs retarded for over 45 years prior to 1923, when the City took title to the Spur.

Had the Spur never existed and the roadway of 42nd Street at this point been left clear, the impulse for high buildings in this vicinity, of which the Court may take judicial notice, would have started years before it did, and these property owners have therefore lost without possibility of recovery the earlier increased value from the development of their property had it been allowed to progress without the intrusion of the Elevated Railroad in that Street, which became practically useless to fill its original mission after a few months existence.

Furthermore, when one considers that the Spur was operated at a loss, if there were any rights taken away from the Petitioners by the removal of the Spur, it is a case of *injuria sine damno.*

In other words, the award for easements for the operation of the Spur is contrary to all the fundamental principles of law and of equity.

(2) Throughout their brief, Petitioners reiterate that the New York Courts arbitrarily valued the rights to

impair the abutting property owners' easements of light, air and access *at the time of the original acquisition* of these rights, but an examination of the opinion of the Appellate Division pursuant to which the award was made will show that the rights were valued *at the time of taking* at not less than upon the basis judicially determined as their value at the time of their acquisition (R. 301, 229 App. Div. 617, 628).

The value at the time of acquisition was fixed as a minimum and inasmuch as the New York Courts were unanimous in holding that the Spur was being operated at a loss at the time of taking, this minimum was applied in order to prevent what said Courts believed would result in an unjust enrichment of the abutting property owners, for the rights obviously had no value for railway purposes at the time of taking, if still existent then, which respondents deny for the reasons heretofore stated.

(3) The Petitioners further endeavor to demonstrate that the Railway Company *acquired the easements* of light, air, and access of the abutting property owners and refer to prior decisions of the Court of Appeals in which the necessity of an accurate definition was not important. In the present case, however, the Court of Appeals correctly analyzed the situation and held in effect that what the Railway Company *acquired* was *the right to impair* the abutting property owners' easements of light, air and access and not the easements themselves (R. 412, 265 N. Y. at p. 180).

In other words, the Railway Company paid the abutting property owners compensation for past and future damages because of the impairment of their easements result-

ing from the operation of the Spur, and it did not acquire the easements of the property owners.

(4) The language from the opinion of the Appellate Division (229 App. Div. 627) quoted at the top of page 30 of Petitioners' brief shows the fallacy of the basis upon which any compensation at all was awarded to the Petitioners for these rights, because the fact that a party pays a substantial sum of money for property is no reason why he should be reimbursed the full amount thereof or more in condemnation proceedings if the said property is worthless at the time of taking.

(5) The proceedings before the Public Service Commission were had pursuant to the provisions of the special act for removal of the Spur (L. 1919, c. 611, as amended by L. 1923, c. 635) and, hence, under the Rapid Transit Act of 1875, the Commission's order was effective to terminate the intangible rights of Petitioners, although further proceedings in the Supreme Court were necessary to vest title in the City to the physical structure of the Spur.

(6) Similarly, Petitioners' contention that the determination of the Public Service Commission has no bearing on the question of the value of the Spur, is untenable, for the proceedings before this Commission were the basis for subsequent steps taken under the aforesaid special act, and if Petitioners did not acquiesce in the findings, they should have sought a review thereof.

(7) Taking the Petitioners' brief as a whole, it raises in the last analysis nothing more than a question of the *quantum* of compensation. A conclusive answer to Peti-

tioners' contentions is, therefore, found in the following decisions of this Court, viz.:

Appleby v. *City of Buffalo*, 221 U. S. 524, 532 (1911);

McGovern v. *City of New York*, 229 U. S. 363, 370-371 (1913).

(8) This Court has held in effect that where a question sought to be raised by the respondents was contested throughout the case and is a necessary element to be determined in fixing the damages claimed by Petitioners and closely related in substance to the case brought before the Court by the Petitioners it may be considered in connection therewith.

United Railways v. *West*, 280 U. S. 234, 253.

In the case at bar, the principal question before the New York Courts was, and before this Court will be, whether or not the Petitioners are entitled to compensation for the rights to impair the abutting property owners' easements of light, air and access. The Petitioners claim that the award of $539,117.41 is inadequate, while the above named respondents claim that it was excessive and that the Petitioners are entitled to no compensation for said rights.

Accordingly, if this Court considers this question, and comes to the conclusion that the rule of damages laid down by the New York Courts was erroneous and that the award is excessive, the judgment should be modified in favor of the above-named respondents by directions to eliminate or reduce the sum granted to the Petitioners by the New York Courts for said rights.

Conclusion.

In view of the foregoing, the judgment of the Supreme Court of New York should be modified in favor of respondents or affirmed, with costs.

Dated, April 1, 1935.

Respectfully submitted,

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Appendix A.

CHRONOLOGY OF SPUR.

1871 New York Elevated Company Incorporated under Railroad Act of 1850, Chap. 140, as amended.
(R. Ex. AX 1619, Vol. III.)

1875

June 18 Rapid Transit Act (Laws, Chapter 606) providing for the construction and operation of steam railways in the counties of the state: also for the appointment of 5 Commissioners with power to determine upon "the necessity of such steam railway or railways" and "exclusive power to locate the route or routes of such railways over, under, through or across streets, avenues, places or lands of such county" and (§5), to "decide upon the plan or plans of construction for such railway or railways", and (§7) "to prepare appropriate articles of association for the Company".

Oct. 29 Manhatan Railway Company Incorporated under Rapid Transit Act of 1875, Chap. 606. Laws of 1875.
(R. Ex. AX 1525 *et seq.*, Vol. III.)

1876 Construction Third Avenue Elevated authorized by Commissioners, approved under Rapid Transit Act and approved by General Term April 15, to be built by New York Elevated Railroad Company from Battery Place along various streets to the Bowery, thence along Third Avenue to East 42nd Street, "thence over, through and along East Forty-second Street to and across Fourth Avenue to *and connecting with the depot known as Grand Central,* occupied by the New York Central and Hudson River Railroad Company, the New York and Harlem Railroad Company, the New York, New Haven and Hartford Railroad Company"; also North of Forty-

second Street along Third Avenue to 129th Street.
(R. Ex. AX 1581-1588, Vol. III.)

1878 Aug. 26 — Third Avenue Elevated opened, as constructed by New York Elevated Railroad Company up Third Avenue from Chatham Square to 42nd Street, thence along 42nd Street connecting with the Grand Central Station.
(R. Ex. AX 296, Vol. I.)

1878 Dec. — Third Avenue Elevated opened north from 42nd Street to Harlem (R. Ex. AX 296, Vol. I.)
A few months thereafter the Spur was found dangerous to operate as a through line from Chatham Square and, as a result of some public action, was *discontinued as a through line* to Grand Central Station and operated with a shuttle service.

Later this physical *connection* between the Spur and *Grand Central Station* was *removed* and the Spur station at Park Avenue was entered only by stair ways from the street.
(R. Ex. AX 296-297, Vol. I.)

1879 — Approval Third Avenue Elevated as constructed from Battery Place to 129th Street by Rapid Transit Commissioners.
(R. Ex. AX 1589, Vol. III.)

1884 — Third Avenue Elevated structure leased by New York Elevated Company to Manhattan Railway Co. for 999 years.
(R. Ex. AX 1593, Vol. III.)

1890 — New York Elevated Railway Co. merged with Manhattan Railway Co.
(R. Ex. AX 1604, Vol. III.)

1902 — Interborough Rapid Transit Company Incorporated under Laws of 1890, Chap. 565.
(R. Ex. AX 1616, Vol. III.)

1903 — Interborough leases Third Avenue Elevated from Manhattan Railway Company for 999 years.
(R. Ex. AX 1139, Vol. II.)

1904 Interborough constructs Lexington Avenue Subway to 42nd Street, thence under 42nd St. to Broadway and up Broadway and Lenox Ave. North to 145th Street.
(R. Ex. AX 614, 669, Vol. II.)

1918 Interborough extends Lexington Ave. Subway north of 42nd St. to Harlem.
(R. Ex. AX 550, Vol. I.)

1921 Public Service Commission, successor to Rapid Transit Commissioners, under Laws of 1907, Chap. 429, determines that
"Spur no longer necessary and convenient for the public service and constitutes an impediment and obstruction to public use of said street."
(R. Ex. AX 1101, Vol. II.)

1923

Dec. 6 Transit Commission, successor to Public Service Commission, as to cities of over a million inhabitants (Laws 1921, Chap. 134, §4*a*) determines necessary alterations to be made at El Station at 42nd Street and 3rd Ave.
(R. Ex. AX 1204 *et seq.*, Vol. II.)

Dec. 7 City vests title to Spur.
(R. Ex. AX 989, Vol. II.)

1924 Removal of Spur completed.
May 22 (R. Ex. AX 986, Vol. II.)

Appendix B.

Excerpt from opinion of New York Public Service Commission, First District, in Matter of Manhattan Ry. Co. (Removal of 42nd Street Spur), 12 P. S. C. Rep. (1st Dist.) 58, at pages 68-69 (1921):

"The defense of the Manhattan Railway Company proceeds chiefly upon two grounds:

(1) That the spur will serve as a feeder to help the Third Avenue Elevated Railroad to secure part of the constantly increasing traffic in the Forty-second Street district; and (2) that in case of the cancellation of the existing lease of the Elevated Road to the Interborough Rapid Transit Company (which now operates the Elevated Road), and the resumption of operation of the Elevated Road by the Manhattan Railway Company, the latter company would lose its connection with Grand Central Terminal, and would thereby lose its share of the traffic to and from that Terminal.

I do not think that either of these contentions can be sustained.

In the first place, the record shows that although the Third Avenue Elevated Road is receiving direct benefit in traffic increase from the tremendous growth of the Forty-second Street District, nevertheless traffic on the Spur is actually decreasing.

In other words, ticket sales at Forty-second Street station of the Third Avenue line were:

in 1916	2,303,728
in 1920	3,339,140

or an increase of more than a million.

While, during the same period, ticket sales on the spur were:

in 1916	1,537,904
in 1920	1,524,427

During this same period, the record shows that ticket sales at other stations of the Third Avenue

line (such as 14th Street and 23rd Street) were practically stationary.

The conclusion to be drawn from the above is that the Third Avenue line is securing its full and fair share of the increased traffic at Forty-second Street caused by the development of that section, and it is securing it without any assistance whatever from the spur, where traffic is actually on the decline.

In the second place, the record shows that if this spur were removed, there would be a tremendous increase in building operations extending as far east on Forty-second Street as Third Avenue; that this would result in bringing many more people to that section, many of whom would for convenience use the Third Avenue line, and would supply a profitable short haul traffic. That the constant flow of people from these buildings to the Third Avenue line would turn much additional traffic in that direction is obvious. Accordingly, even if the lease of the elevated road to the Interborough Rapid Transit Company were to be cancelled (which seems to be a remote possibility), the removal of this spur would not cut the company off from the Forty-second Street district and would not deprive the company of its share of traffic from that district, but rather would extend that district so as to embrace Third Avenue, with much resultant benefit to the Third Avenue Elevated Railroad."

Appendix C.

EXTRACTS FROM RAPID TRANSIT ACT OF 1875.

(Italics ours.)

"SECTION 1. Whenever it shall appear, by the application of fifty reputable householders and taxpayers of any county in this State, verified upon oath before a justice of the Supreme Court, that there is *need* in such county of a steam railway or railways for the transportation of passengers, mails or freight, the board of supervisors of said county may, within thirty days after presentation to them of such application, duly verified as aforesaid, appoint five commissioners. * * *"

"SECTION 4. Said commissioners shall, within thirty days after such organization, determine upon the necessity of such steam railway or railways, and if they find such railway or railways to be *necessary* in such county, they shall, within sixty days after such organization, fix and determine the route or routes for such steam railway or railways. * * * the *determination of three commissioners,* appointed by the General Term of the Supreme Court in the district of the proposed construction given after a due hearing of all parties interested and confirmed by the Court, that such railway or railways *ought to be constructed or operated* be taken in lieu of the consent of such property owners."

"SECTION 17. Every such corporation shall have the right to acquire and hold such *real estate, or interest therein, as may be necessary to enable them to construct, maintain and operate the said railway or railways and such as may be necessary for stations, depots, engine houses, car-houses and machine shops, and in case any such corporation cannot agree with the owner or owners of any such real estate, or of any interest therein, it shall have the right to acquire title to the same in the manner and by the special proceedings prescribed in this act.*"

"SECTION 19. * * * The Court shall hear the proofs and allegations of the parties, and if no sufficient cause is shown against granting the prayer of the petition, it shall make

an order for the appointment of *five disinterested and competent persons,* who reside in the county where the premises to be appraised are situated, *commissioners to ascertain and appraise the compensation to be made to the owners or persons interested in the real estate proposed to be taken* in such county *for the purposes of the company,* and to fix the time and place for the first meeting of such commissioners."

"SECTION 20. * * * in determining the amount of such compensation, they *shall not make an allowance or deduction on account of any real or supposed benefits which the party in interest may derive from the construction of the proposed railroad.* * * *"

"SECTION 22. * * * *the said land for the purpose of its incorporation* during the continuance of its corporate existence, by virtue of this or any other act; and all *persons* who have been made parties to the proceedings shall be *divested and barred of all right, estate and interest in such real estate, during the corporate existence of the company as aforesaid.* * * * *All real estate acquired by any company* under and pursuant to the provisions of this act, for *the purposes of its incorporation,* shall be deemed to be *acquired for public use.*"

"SECTION 25. In case any *title or interest in real estate required* by any company formed under this act, *for the purpose of its incorporation,* shall be vested in any trustee not authorized to sell, release and convey the same, or in any infant, idiot or person of unsound mind the Supreme Court shall have power by a summary proceeding on petition, to authorize and empower such trustee, or the general guardian or committee of such infant, idiot or person of unsound mind, to *sell and convey* the same to such company, *for the purposes of its incorporation,* of such terms as may be just * * *."

"Section 26. Every corporation formed under this act shall have power:

1. To take and hold such *voluntary grants of real estate* and other property as shall be made to it, *to aid in the construction, maintenance and accommodation of its railroad;* but the real estate received by

voluntary grant shall be *held and used for the purposes of such grant only.*

2. To purchase, hold and use all such real estate and other property as may be *necessary for the construction and maintenance of its railroad,* and the stations and *other accommodations necessary to accomplish the object of its incorporation.* • • •

5. • • • and *in all cases the use of the streets, avenues, places and lands designated by the said commissioners and the right of way through the same for the purpose of a railway or railways* as herein authorized and provided, shall be considered, and is hereby *declared to be a public use* • • •."